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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 990

HENRY DUTRA GEORGE,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District

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PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California,
First Appellate District

Petitioner Henry Dutra George prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District.

OPINION BELOW

The opinion of the Court of Appeal (*People v. George,* ... C.A.2d ...) is set forth in Appendix A.

The order of the California Supreme Court denying Petition for Hearing is set forth in Appendix B.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is September 24, 1969.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

One

Did the California Court of Appeal deny petitioner his right to a fair trial in violation of the Sixth[1] and Fourteenth[2] Amendments by its affirmance of the rulings of the trial court as follows:

1. Admitting against petitioner on both counts[3] the hearsay declarations of alleged co-conspirators where said declarations (a) showed only past actions or the opinion or belief of the person making the declaration, and/or (b) were made after the conspiracy ended, and/or(c) were made after the overt act charged had been completed, and/or (d) were made after the declarant[4] had volunteered to become, and did become, a paid Sheriff's agent for the purposes of exculpating himself and obtaining evidence against the petitioner; and

2. Admitting against petitioner on both counts[3] the testimony of petitioner's wife, Margaret Ruth George, that she wrote a letter prior to the alleged conspiracy stating that "if anything happens to me

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[1]Confrontation.
[2]Due Process.
[3]Conspiracy and murder.
[4]Willie Harris.

. . . my husband (petitioner) should be suspected of it."

Two

Did the California Court of Appeal deny petitioner his right to a fair trial in violation of the Sixth[5] and Fourteenth[6] Amendments by its affirmance of the rulings of the trial court denying petitioner's several motions for a new trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments of the Constitution of the United States, as follows:

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Fourteenth Amendment:

> "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

Appellant Henry D. George, of Portuguese descent, was a successful builder and property owner in the Seaside area in Monterey County, California. He

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[5]Confrontation.

[6]Due Process.

was married to Margaret George; they had four children. She filed for divorce in the spring of 1967. During the days preceding June 20, 1967, three Negro ex-felons, Willie Harris, Ivory Collins and Melvin Wigfall, plotted to kill Mrs. George. On the night of June 20, 1967, Collins and Wigfall drove to the George ranch house to kill Mrs. George; they saw a lady which Collins claimed they thought was Mrs. George, looking out the front porch window. Wigfall killed the lady with a shotgun blast. It turned out that the deceased was Tommie Ann Jarvis who was baby sitting for Mrs. George, although at the time of the shooting neither Mrs. George nor her children were at the George home where the shooting took place.

Thereafter petitioner was indicted for murder and conspiracy to murder.[7]

Prior to the trial, petitioner noticed a written motion for separate trial, wherein the grounds and supporting affidavit thereof alleged that the "defense

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[7]Count I: ". . . That on or about June 20, 1967, in the County of Monterey, State of California, said Melvin Wigfall, Ivory Collins and Henry Dutra George, did willfully, unlawfully, feloniously and with malice aforethought murder Tommie Ann Jarvis, a human being."

Count II: ". . . That within six months last past, at the County of Monterey, State of California, said Melvin Ray Wigfall, Ivory Collins and Henry Dutra George, did willfully, unlawfully and feloniously conspire, combine, confederate and agree together to murder Margaret Ruth George."

Overt Act No. 1: "That thereafter, at and in the County of Monterey, and in pursuance of said conspiracy, and to effect its objective, the said Mevin Ray Wigfall, Ivory Collins and Henry Dutra George, did, on or about the said 20th day of June, 1967, murder Tommie Ann Jarvis in the home of Margaret Ruth George in the belief that the said Tommie Ann Jarvis was Margaret Ruth George." (CT 1-2.)

of Henry Dutra George may be entirely antagonistic to the defense of . . . Melvin Ray Wigfall," (CT 41-46), citing therein *People v. Aranda*, 63 Cal.(2d) 518 and *People v. Alaracon*, 200 Cal.App.(2d) 290 (CT 45-46).

This motion for severance was heard by the Honorable Gordon Campbell, Judge, on October 24, 1967, and was denied. (CT 47.) The trial judge was the Honorable Stanley Lawson, Judge; and on the first day of trial, before jury voir dire, appellant orally renewed his motion for separate trial (RT 4-6), on the ground among other things that the evidence would show mention of Henry George by co-defendant Wigfall in telephone conversations with officers, which motion for severance was also denied. (RT 7: "Their motion is denied.")

After the jury was selected, defendant Ivory Collins was discharged under Section 1099 Penal Code and was called as the first witness for the prosecution. (RT 30-36.)

Thereafter testimony and evidence was presented by both the prosecution and the defense.[8]

On December 7, 1967, the jury found Henry George guilty of second degree murder, Count I, and guilty of conspiracy to murder, Count II; and found co-defendant Wigfall guilty of first degree murder, Count I, and guilty of conspiracy to murder, Count II. (CT 79-81, 83-87.) The jury fixed the penalty for

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[8]Because the portions of the record relied upon under Rule 23, Subparagraph (f), are voluminous, they are included as Appendix C. (Concise Statement of Material Facts.)

Henry George under Count II as life imprisonment, and fixed the penalty for Wigfall under each of Counts I and II as life imprisonment. (CT 88-93.)

Henry George filed a noticed motion for new trial on December 28, 1967 (CT 96), which was denied by the trial court January 4, 1968 (CT 114). On January 4, 1968, appellant Henry George was arraigned for judgment and judgment of conviction as to both Counts I and II was rendered and entered, and he was sentenced to California State Prison as prescribed by law (five years to life) Count I, and for life, Count II (with the sentences to run concurrently). (CT 114-115.)

REASONS FOR GRANTING THE PETITION

AS TO QUESTION ONE

DID THE CALIFORNIA COURT OF APPEAL DENY PETITIONER HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH[9] AND FOURTEENTH[10] AMENDMENTS BY ITS AFFIRMANCE OF THE RULINGS OF THE TRIAL COURT AS FOLLOWS:

1. Admitting against petitioner on both counts[11] the hearsay declarations of alleged co-conspirators where said declarations (a) showed only past actions or the opinion or belief of the person making the declaration, and/or (b) were made after the conspiracy ended, and/or (c) were made after the overt act charged had been completed, and/or (d) were

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[9]Confrontation.

[10]Due Process.

[11]Conspiracy and murder.

made after the declarant[12] had volunteered to become, and did become, a paid Sheriff's agent for the purposes of exculpating himself and obtaining evidence against the petitioner; and

2. Admitting against petitioner on both counts[11] the testimony of petitioner's wife, Margaret Ruth George, that she wrote a letter prior to the alleged murder and prior to the alleged conspiracy stating that "if anything happens to me . . . my husband (petitioner) should be suspected of it."

Argument

As to Question One, paragraph 1 (supra) the material facts of the record, together with the rulings of the trial court, are set forth in Appendix C, pages 15 to 35; and the opinion of the appellate court affirming the trial court, is set forth in the Court's opinion, Appendix A, pages 7 to 8.

It will be noted that neither the trial court nor the appellate court considered or ruled upon petitioner's claim of denial of his constitutional rights under the Sixth and Fourteenth Amendments as the same are set forth and claimed in this petition.

As to said claim, petitioner contends:

a. That the admission in evidence of the hearsay declarations violated the Sixth and Fourteenth Amendment rights of petitioner to confront and cross-examine the witnesses against him.

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[12]Willie Harris.

b. Even though a statement is not introduced for its truth as against the non-declarant defendant, it nevertheless violates the due process right to confront and cross-examine the declarant at the time of the making of the statement. *Douglas v. Alabama,* 380 U.S. 415, 419-420.

The cases of *Bruton v. United States,* 391 U.S.....,
20 L.ed.(2d) 476, and *Roberts v. Russell,* .....U.S.....,
20 L.ed.(2d) 1100, and *Pickens v. Oliver,* .....U.S.....,
20 L.ed.(2d) 1105, established this Sixth and Fourteenth Amendment due process rule, and applied the rule retroactively to the states, including California.

Also, the additional holding implicit in *Pickens v. Oliver,* supra, was that a hearsay objection invokes the Sixth and Fourteenth Amendments due process right to confront and cross-examine witnesses. See *People v. Valdez,* 82 Cal.App.(2d) 744, 749; 5 *Wigmore on Evidence* (3rd Ed. 1940), Sections 1362, 1365, 1395-1397).

Accordingly, petitioner respectfully contends that the admission of the hearsay declarations by Harris, Wigfall and Collins resulted in a denial of his Sixth and Fourteenth Amendment rights and that said question of constitutional right has never been ruled upon by the courts below.

Argument

As to Question One, paragraph 2 (supra), the material facts of record relied upon by petitioner with reference to this portion of his argument are set forth in Appendix C, pages 35 to 37; and the opinion of

the appellate court affirming the trial court is set forth in the Court's opinion, Appendix A, pages 9 to 13.

In this connection, the Court of Appeal stated in its opinion that petitioner's argument is of such dimension as to require examination of the disputed evidence in its full context. (See Appendix A, pages 9 to 13.)

After so examining the evidence, the Court of Appeal held that the trial court erred in permitting Mrs. George to testify with reference to the letter, but that the error was not prejudicial in any sense requiring reversal. (See Appendix A, pages 9 to 13.)

Again, it will be noted that neither the trial court nor the Court of Appeal considered or ruled upon petitioner's claim of denial of his Constitutional rights under the Sixth and Fourteenth Amendments, as the same are set forth and claimed in this petition.

As to said claim, petitioner's contentions are the same as those set forth under the preceding argument with reference to Question One, paragraph 1, and petitioner hereby adopts each and every of said arguments and points of law in support thereof by reference thereto.

In addition, petitioner contends that the error was prejudicial within the meaning of *Chapman v. California,* 386 U.S. 18, and *Fahy v. Connecticut,* 375 U.S. 85.

AS TO QUESTION TWO

DID THE CALIFORNIA COURT OF APPEAL DENY PETITIONER HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE SIXTH[13] AND FOURTEENTH[14] AMENDMENTS BY ITS AFFIRMANCE OF THE RULINGS OF THE TRIAL COURT DENYING PETITIONER'S SEVERAL MOTIONS FOR A NEW TRIAL?

Argument

The facts of record in support of this contention are set forth in Appendix C, pages 34 to 35; and also see this petition, pages 4 to 5, for the facts with reference to petitioner's pretrial motions for severance, and the adverse rulings of the trial court thereon. Also see Appellate court opinion Appendix A, page 2.

Once again, it is to be noted that neither the trial court nor the Court of Appeal considered or ruled upon petitioner's claim of denial of his Constitutional rights under the Sixth and Fourteenth Amendments, as the same are set forth and claimed in this petition.

The record shows that Petitioner twice moved for a separate trial, before the trial by a noticed motion, and, on the first day of the trial; each time the ground urged was that the "defense of Henry Dutra George may be entirely antagonistic to the defense of . . . Melvin Ray Wigfall." (See this petition, pages 4 to 5.) Both motions for severance were denied. (See this petition, page 5.)

How necessary to a fair trial of Petitioner a severance was, can be seen by reviewing the testimony

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[13]Confrontation.

[14]Due Process.

of co-defendant Wigfall. (See Appendix C, pages 37 to 38.) Wigfall testified that Petitioner conspired with Willie Harris to burn the house Willie Harris was buying from Petitioner for the purpose of collecting insurance money; and that by reason thereof, Petitioner was indebted to Willie Harris for a payment of $1,000, and that it was this $1,000 that Wigfall was trying to collect when he went to San Jose with Collins.

Thus Petitioner was faced not only with a murder and conspiracy to murder charge, he was also faced, by Wigfall's testimony, with an arson charge. Whether or not the jury believed the testimony of Wigfall, the defense of Wigfall was seriously damaging to the integrity of Petitioner in the eyes of the jury. Such testimony could not have occurred to harass Petitioner, had the separate trial of Petitioner either preceded or followed the trial of Wigfall.

Under the principles set forth in *People v. Aranda,* 63 Cal.(2d) 518, and *People v. Alaracon,* 200 Cal. App.(2d) 290, it was reversible error to fail to sever the trial of appellant.

Petitioner contends that the failure of the trial court and the appellate court to grant his motions and petition for a separate trial constitute plain error within the meaning of *Tillery v. United States,* 411 F.(2d) 644 (5th Cir.), and, accordingly, this petition should be granted.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition for Writ of Certiorari be granted.

Dated, San Francisco, California,
December 15, 1969.

GEORGE T. DAVIS,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Criminal No. 7289

The People of the State of California,
Plaintiff and Respondent,
vs.
Melvin Ray Wigfall and
Henry Dutra George,
Defendants and Appellants.

OPINION
(not to be published in Official Reports)

Count 1 of an indictment charged appellants Melvin Wigfall and Henry Dutra George with the murder of Tommie Ann Jarvis. (Pen Code, § 187.) Count II thereof charged them with conspiracy to murder Margaret Ruth George. (Pen. Code, § 182.) A jury found Wigfall guilty of first degree murder on Count I, George guilty of second degree murder on Count I, and both men guilty on County II. Each appeals from the judgment of his conviction.

We do not find it necessary to recite the extensive evidence, which is adequately summarized in the briefs. For the reasons next indicated, point by point as raised by the appellants together and separately, we affirm the judgments.

Both appellants complain of the trial court's denial of their respective motions for separate trials; each relies upon the principles declared in *People v. Aranda* (1965) 63 Cal.2d 518, 529-530. But *Aranda* relates to the prosecution's use of one defendant's extrajudicial statement implicating another, and permits a joint trial (with controls upon use of the statement) or requires separate trials if such use cannot be effectively controlled. (*People v. Aranda, supra,* at pp. 530-531. It is settled that the *Aranda* rules do not apply to extrajudicial statements by one conspirator implicating another. (*In re Domingo* (1969) 268 A.C.A. 698, 706 and cases cited.) The discretionary standards generally applicable upon a co-defendant's motion for separate trial (Pen. Code, § 1098; *People v. Clark* (1965) 62 Cal.2d 870, 883) were followed below; following them on the appeal (*People v. Clark, supra*), we will not disturb the trial court's exercise of discretion in denying both appellants' motions.

Wigfall's Contentions

(1) The testimony of Harris and Collins, as accomplices, was amply corroborated by other evidence as required by Penal Code section 1111. A detailed summary of the corroborating evidence is set forth in the Attorney General's brief.

(2) The trial court did not err in giving the jury the cautionary instruction relative to oral admissions, but limited only to George. Wigfall's trial counsel requested no such instruction as to Wigfall, and it could have disserved his defense. Omission of the cautionary instruction is not necessarily reversible error (*People v. Sutton* (1964) 224 Cal.App.2d 708, 711-712), and its omission here was not prejudicial even if it were viewed as error. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837. See *People v. Wheelwright* (1968) 262 A.C.A. 73, 80-82.)

(3) In his argument on point no. 2, *supra*, Wigfall's counsel suggests that the prosecutor's use of the Jones transcript in cross-examining Wigfall was misconduct, or that the trial court erred in permitting it, or both. There was no objection to this technique, however, and neither prejudicial misconduct nor judicial error appears.

(4) The instruction given the jury relative to its weighing the testimony of Collins* "in the same manner as any other witness" did not conflict with the instruction that testimony of an accomplice was to be "viewed with distrust." The "in the same manner" instruction was explicitly qualified with the admonition that the Collins testimony was to be weighed "in accordance with such instructions given thereon by this court."

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*We recognize that the instruction did not identify Collins by name. It referred, however, to the testimony of a "defendant . . . discharged, that he may be a witness for the people" pursuant to Penal Code section 1099; this was unmistakably Collins.

(5) Wigfall complains of the instruction that Collins and Hill, each of whom made a judicial confession, were accomplices as a matter of law. His argument relies upon *People v. Hill* (1967) 66 Cal.2d 536, in which the Supreme Court disapproved of this instruction where it might result in the jury's imputing a "confessing defendant's foregone guilt to the other defendants." (*Ibid.*, at p. 555.) But Collins and Harris were not codefendants; and the instruction actually given would not have produced the undesired imputation because—naming them both, but no one else—it associated them with each other but not with Wigfall. (He alone complains, George having requested the instruction.)

Wigfall argues that the instruction fails under *Hill* because it did not specify that Collins and Harris were, as a matter of law, accomplices "with each other." We do not agree that the omission produced the result he claims. The instruction was otherwise favorable to his defense, because it required that the testimony of Collins and Harris be corroborated by independent evidence. (Pen. Code, § 1111.) Since it was not proscribed by the Hill rule (*People v. Hill, supra,* 66 Cal.2d 536 at p. 555) for the reasons mentioned above, the instruction was proper. (See *People v. Luker* (1965) 63 Cal.2d 464, 472 [citing *People v. Robinson* (1964) 61 Cal.2d 373, 393-395]; *People v. Bowman* (1966) 240 Cal.App.2d 358, 388.)

(6) The trial court did not err in instructing the jury that Wigfall was either innocent of the charge of murder or guilty of murder in the first degree.

Wigfall's argument to the contrary amounts to an assertion that the evidence would have supported his conviction of a lesser degree of homicide, which is to say that instructions on lesser offenses should have been given as to him. But he requested no such instructions, and there was no evidence warranting them. This was not true of George; and the challenged instruction properly informed the jury that the lesser-offense instructions given as to George had no application to Wigfall. The latter argues in effect that the instruction is permissible only in felony-murder cases. (Pen. Code, § 189; see, e.g., *People v. Turville* (1959) 51 Cal.2d 620, 632-633; *People v. Riser* (1956) 47 Cal.2d 566, 581.) But the reason that it was held proper in those cases was that the evidence presented "no tenable theory" (*People v. Turville, supra,* at p. 632) requiring lesser-offense instructions. The same reason justified it here.

(7) Evidence of his 1960 felony conviction was properly received against Wigfall, for impeachment purposes, although he had testified that he had pled guilty to the 1960 charge after he had made statements to the police without having received an *Escobedo* admonition. (*Escobedo v. Illinois* (1960) 378 U.S. 478, 484.) His testimony established, however, that his 1960 guilty plea was entered voluntarily and while he was represented by counsel; this being so, he did not sustain his burden (*People v. Coffey* (1967) 67 Cal.2d 204, 217 [fn. 15 at p. 217]) of showing that the 1960 conviction was *obtained* in violation of constitutional guaranties. (*People v. Coffey, supra,* at

pp. 218-219.) Moreover, he has not persuaded us that the admission of the 1960 conviction was prejudicial if it was error: in light of all the evidence of his guilt, the prosecution has proved "beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Coffey, supra,* at p. 219.)

(8) Wigfall asserts prejudicial misconduct by the prosecutor with respect to a handgun found in his possession when he was arrested, and the presence of marijuana at his home. If either event amounted to misconduct (and we are not persuaded that it did), its effect was dispelled by the trial court's prompt admonition to the jury.

Wigfall also contends that the prosecutor committed prejudicial misconduct in making two statements during argument to the jury. We do not view the first one (relative to the duty of the district attorney) as an expression of personal belief in the guilt of either accused (such as was condemned in *People v. Alverson* (1964) 60 Cal.2d 803, 808-809 and in the cases there cited; it spoke of the district attorney's duty to exonerate the innocent as well as to convict the guilty, and it appears to have been within the bounds of legitimate argument. (See *People v. Dillinger* (1968) 268 A.C.A. 145-148; *People v. Johnson* (1950) 99 Cal.App.2d 717, 729-730.) It was in any event a comment which admonition by the trial court could have effectively cured (*People v. Modesto* (1967) 66 Cal.2d 695, 716), and no objection was made; for that reason, Wigfall may not complain

of it on the appeal. (*People v. Modesto, supra,* at pp. 716-717.)

The second statement by the prosecutor, relative to a comparison of the public's trial expense with the $250 paid to Harris, also did not amount to an expression of belief in Wigfall's guilt. Upon objection, moreover, discussion of the subject was terminated; no prejudice appears.

(9) Wigfall contends that he was prejudiced by certain remarks of the trial court relative to the similarity between his and George's defenses. Neither remark, in the language used and in context, warrants the assertion. He also argues that the trial court should have declared a mistrial after Collins volunteered testimony attributing to attorney Panelli a statement relative to the absence of "conflict" between him (Collins) and Wigfall. But the volunteered testimony was received without objection; no motion for mistrial was made, and no jury admonition was requested. (See *People v. Modesto, supra,* 66 Cal.2d at p. 716.) So far as appears, the alleged statement by Mr. Panelli was innocuous and passed unnoticed. No prejudice to Wigfall has been shown.

George's Contentions

(1) George challenges the admission against him of certain hearsay statements by coconspirators which, he contends, were not made "in furtherance of" the conspiracy because they were "mere declarations showing past acts or the opinion or belief" of the respective declarant. His trial objection to this evi-

dence was upon the ground that the People had not *prima facie* established a conspiracy when the evidence was offered. The trial court properly admitted the evidence conditionally at the time (Evid. Code, § 1223, subd. [c]; *People v. Calhoun* (1958) 50 Cal. 2d 137, 144), and the complaint now made was not urged below. Although we have nevertheless considered it on the appeal, we find no merit in it. The declarations of Wigfall and Harris to which Collins testified, the statement attributed to Harris by the witness Rennels, and the declarations of Wigfall, Collins and Harris related in the testimony of Shephard, Cook and Jones, were made in furtherance of the objective of the conspiracy. They were therefore admissible within a well established exception to the hearsay rule. (Evid. Code, § 1223, subd. [a]; *People v. Ferlin* (1928) 203 Cal. 587, 599; *Laurel v. Superior Court* (1967) 255 Cal.App.2d 292, 297.)

(2) George's corollary argument—that any evidence of the above-mentioned statements made after certain successive points in time was inadmissible because any conspiracy terminated at each point—is also without merit. Some of the statements were in furtherance of a continuing conspiracy to murder Margaret George, others related to completion of the original contract by collecting payment from George for the act performed on June 20. The testimony concerning them was therefore admissible. (Evid. Code, § 1223, subd. [b]; *People v. Ross* (1941) 46 Cal.App.2d 385, 396-397. See *People v. Smith* (1966) 63 Cal.2d 779, 793-794; Fricke, California Criminal Law (9th ed. 1965) Conspiracy, pp. 128-129.)

(3) George contends that the trial court erred in instructing the jury that "in a prosecution for conspiracy to commit murder and for murder, no further corroboration of an accomplice's testimony relating to the murder is required where the same evidence that connects each defendant with the conspiracy also connects him with the murder." The instruction was correct. (*People v. Buono* (1961) 191 Cal.App.2d 203, 215-216. See *People v. Ray* (1962) 210 Cal.App.2d 697, 699-700; *People v. Hutchinson* (1967) 254 Cal.App.2d 32, 38-39.) George argues that it actually operated to deprive him of the benefit of the rule requiring corroboration of accomplice testimony by independent evidence. (Pen. Code, § 1111.) But the jury was fully instructed on the latter rule generally, and we are not persuaded that the jurors ignored it because this instruction was given.

(4) George contends that the trial court erred in admitting evidence concerning the contents of a letter written by Margaret George before the Jarvis murder. His argument requires examination of the disputed evidence in its full context. The witness was Margaret George herself, testifying under direct examination as a witness for the People. In response to questions by the prosecutor, she testified—without objection—to several occasions upon which George had threatened her, including one when he threatened to kill her.

The prosecutor then asked her if she had been in fear of her life "from Mr. George" before the Jarvis killing. The trial court overruled George's objection,

citing Margaret's "state of mind" as "a material element." The witness then answered the question "No." The prosecutor asked her if she had written "a letter to anyone indicating any possibility" of her sudden death. George's counsel objected upon the ground that the question was an attempt by the prosecution to impeach its own witness. The objection was overruled, whereupon the witness answered the question, "Yes, I did."

Asked to whom she had written the letter, she said "I gave the letter to Darlene Sanchez. I wrote it to whom it may concern, and I told her to turn it over to the police in the event anything should happen." George's counsel again objected, upon the ground that "this is going to . . . [the witness's] . . . state of mind." The trial court agreed, but overruled the objection and received the evidence "for that limited purpose." The witness was then permitted to testify that "I said [in the letter] that if anything happened to me that was not obviously an accident, that my husband [George] should be suspected of it."

George's counsel then moved for a mistrial. The trial court denied the motion, stating that "this comes within the rule of *People v. Markouris,* 52 Cal.2d 672, 682, . . . that the declarations that the defendant threatened the victim were admissible not to prove the fact directly but to prove the victim's fear as identification of the defendant as a killer is in issue . . ."

We first observe that the evidence in dispute here was to the effect that the witness feared George, not that he had threatened her: the latter fact had pre-

viously been established in her testimony. The *Merkouris* rule permitted hearsay evidence, not of threats by an accused, but of the victim's fear as proof that threats had either been made by the accused or implied by his conduct. (*People v. Merkouris* (1959) 52 Cal.2d 672, 682-683.) The rule itself, moreover, was in effect abolished with the enactment of Evidence Code section 1250, subdivision (b). (See Legislative Committee Comment, 29B West's Evid. Code Ann., § 1250, p. 272; Witkin, California Evidence (1966) § 563, pp. 536-537.) Accordingly, *People v. Merkouris* did not authorize the admission of Margaret's testimony concerning her fear of George as expressed in her letter.

It next appears that the testimony was elicited to impeach the witness's statement denying that she had been in fear of her life from George. The prosecutor could do this to his own witness (Evi. Code, § 785; see Witkin. *op. cit. supra,* §§ 1270-1271, pp. 1176-1177), but the validity of such action was dependent upon whether she had properly been permitted to testify in the first instance—over George's objections --as to whether or not she *had* feared for her life at his hands. In our view, she should not have been permitted to do so, because her state of mind in that regard was not in issue. (Evid. Code, § 1250, subd. [1]. Compare *People v. Atchley* (1959) 53 Cal.2d 160, 171-172; *People v. Finch* (1963) 213 Cal.App.2d 752, 763. See *People v. Lew* (1968) 68 Cal.2d 774, 778-780.)

The Attorney General defends the admission of the disputed evidence upon the ground that it refuted elements of George's defense tending to show that the witness was an aggressor in their conflicts. But, if this argument is valid, it would permit such evidence only by way of rebuttal; this evidence was offered and received as part of the People's case in chief and before any evidence to the contrary had been introduced by George.

The arguments advanced in support of the admissibility of this evidence also ignore the status of Margaret George. The "state of mind" exception to the hearsay rule applies to evidence of declarations by the victim in a murder prosecution because the death of the declarant requires resort to hearsay. (*People v. Hamilton* (1961) 55 Cal.2d 881, 895.) Margaret George was alive and in court; that she had been the *intended* murder victim does not in itself endow her fear of the accused with any relevance otherwise lacking. The trial court therefore erred in permitting her to answer on that subject and, that being so, in permitting the answers impeaching her denial of such fear.

We have discussed this error in detail in order to respond effectively to the arguments advanced concerning it on George's appeal. However, we view the error as not prejudicial to George in any sense requiring reversal. It was balanced to some extent by the elements of George's defense depicting his wife as an aggressor toward him, and it falls entirely outside the great mass of evidence implicating him as

a conspirator to murder her and in the murder of Tommie Ann Jarvis. We perceive no reasonable probability that " 'a result more favorable to the appealing party would have been reached in the absence of the error.' . . . In short, from an 'examination of the entire cause, including the evidence,' it is our 'opinion' that the 'error complained of has' not 'resulted in a miscarriage of justice.' " (*People v. Watson, supra,* 46 Cal.2d 818 at pp. 837-838.)

Other points raised or suggested in the briefs by Wigfall's and George's respective counsel, and those advanced in two briefs filed by Wigfall in pro. per., do not require examination. The appeals have been exceptionally well briefed by all counsel. Having examined all the arguments and the extensive record, we conclude that both appellants were fairly tried and fairly convicted.

The judgments of conviction are affirmed.

Rattigan, J.

We concurr:

Devine, P. J.

Christian, J.

Filed August 1, 1969,
Lawrence R. Elkington, Clerk.

Appendix B

Clerk's Office Supreme Court
4250 State Building
San Francisco, California 94102

September 24, 1969

Dear Sir: I have this day filed Order
Hearing Denied
In re: 1 Crim No. 7289
People
vs.
George

Respectfully,
William I. Sullivan, Clerk.

Appendix C

CONCISE STATEMENT OF MATERIAL FACTS

Hearsay Declarations:

Ivory Collins testified that three or four days before the murder, Wigfall mentioned to Collins in the street that he "had a deal going", (RT 40-41); then Willie Harris "called me over" to Willie Harris' house and, in a conversation about what Collins thought of "the deal Melvin had set up," (RT 41), Willie Harris told Collins "that it was something about Mrs. George; Melvin had made a deal with George." (RT 42).

At this point, the hearsay objection of appellant was sustained, the trial judge ruling,

> "That's true. You haven't established any conspiracy yet." (RT 42).

When Wigfall and Collins cased the George ranch house that night, Wigfall went on to explain to me that "the deal was that he was to kill Mrs. George." (RT 42). At this point the appellant requested that the jury be instructed that these statements "not be considered against Mr. George", (RT 42), and the trial judge told the jury:

> "That's right. At this time that's true. The statements made or conversations between Wigfall and Collins are not binding on George at this time." (RT 43).

Collins testified that while still casing the place:

> "[Wigfall] went on to explain to me that he had been talking about this for, oh, a week or so with

Willie Harris and Mr. George, I assume." (RT 43).

At this point the trial judge sustained the objection of appellant "as to what this witness assumes", and the trial judge told the jury:

". . . (T)he jury is admonished this testimony is not binding on Mr. George at this time. Proceed." (RT 43).

Collins testified that on the very next day, June 17, 1967, (RT 44, 47), Willie Harris, Wigfall and Collins had a conversation "about the money", to which appellant objected:

"Your Honor, at this point I want to again impose the objection as to anything this witness is talking about.

The Court: I will admonish the jury again that none of this is binding upon Mr. George, whether his name comes up or not. This shall not be considered against him. The jury is admonished accordingly." (RT 45).

Collins, being thus allowed to continue his testimony, testified:

"So, Willie Harris, myself and Melvin were sitting over at Melvin's house and then the idea came up at least the words to the effect that $6,000 would be paid for the death of Mrs. George, . . . Willie Harris said that he had talked to George and that George had guaranteed him that to not worry about the amount of money; that he [Henry George] would rather pay up six thousand or so dollars than have his wife receive $150,000 in money or property. . . . He [Willie

> Harris] said that once the woman was killed then we would have Mr. George in a bind and that we would be able to bleed him for any amount of money that we felt was necessary."

Further that:

> ". . . the $6,000 wouldn't be paid until after the death because it was $6,000 in escrow and that this money was for a house that had been sold and that this money was in both Mrs. George and Mr. George's name, but that prior to (sic.) the death Mr. George would withdraw the $6,000 out of the bank or wherever it was at, and then would pay that to us for killing Mrs. George." (RT 46-47).

Collins testified that he left this meeting of June 17 to go home to the birthday party that he gave his wife the night of the 17th—a Saturday—; at which party Wigfall told Collins that "Willie Harris had heard from Mr. George and that the information was that Mrs. George was either in San Jose or going to San Jose."

> "[Appellant]: One minute please. I want to make sure the objection is continued.
>
> The Court: Oh, yes. I have admonished the jury that none of these conversations are evidence against Mr. George inasmuch as he hasn't been connected up to these men as yet if he ever shall be, and the jury is admonished accordingly. Proceed." (RT 47).

"The next thing that happened" was a meeting of Willie Harris, Wigfall and Collins at Jimbo's bar of which Willie Harris was the manager, on Mon-

day, June 19, 1967, (RT 50), at which time Collins "was told" by Willie Harris and Wigfall that:

> "George, he had got on back from Mexico, and that he was wondering why his wife hadn't been killed, and I was also told that he [Henry George] was going into the hospital . . . the next day [June 20th] to have a nose operation, and that would be a good time to kill Mrs. George because then he would have an alibi . . ." (RT 50-51).

(Collins testified he did see Henry George once at Jimbo's, at which time Henry George was having a conversation with Willie Harris, "two nights . . . or a night, two nights" before the murder, but Collins testified he neither met Henry George that time nor had any conversations with him. (R.T. 39, 50).

On June 20th, "the actual date of my wife's birthday", (RT 53), Collins reported to Jimbo's bar before 6:30 or 7 p.m., (RT 52-53), at which time,

> "Willie Harris told us [Collins and Wigfall] that George had entered the hospital, and that he wanted his wife killed, and this would be the best time to do it." (RT 52-53).

About a week after the murder, Collins and Wigfall went to Willie Harris' house and the three of them then drove to the Ord Grove apartments of Henry George, (RT 78); Willie Harris went in, came out and told the killers that Henry George "would meet us". (RT 79). Collins told Willie Harris that wouldn't do:

> "Get back in there and tell George to come out or we'd come in. So about two or three minutes

later he came out and say George say, okay, that he'd meet us around the corner but didn't want to meet us in front of the house . . ." (RT 79).

The trial court at this point sustained the renewed objection of appellant to hearsay:

"The Court: Yes, hearsay. At this time, yes. . . . Mr. George isn't there, and there is no proof of conspiracy at this time, so it is not binding on Mr. George. The jury is admonished accordingly.

Appellant: We had a continuing objection yesterday and this morning.

The Court: All up to this time we have nothing that is evidence against Mr. George. Jury is admonished to disregard it." (RT 79-80).

The appellant objected to hearsay evidence consisting of what was said at the Willie Harris garage, after Collins and Wigfall had gone there to collect the money Henry George had promised them that morning at the schoolyard:

"Appellant: . . . I object to any statements made by Willie Harris during this time in the house, including the statement, 'Yes, the money is left.' The statement already admitted as hearsay as to George.

The Court: Objection sustained. The statement, 'the money was left', is not binding on Mr. George.

The People: Isn't that a furtherance or dealing with the conspiracy, Your Honor?

The Court: I don't know that a conspiracy has been established yet.

The People: Well, there is some proof of this meeting with Henry George, discussion about

killing his wife. . . . In fact, within a week after the killing the four of them had a meeting and discussed the payment of money, and it was all right that it was—it was understandable that the killing was a mistake and why the wife was not killed, and it seems to me that was sufficient indication of a conspiracy.

The Court: What is your position?

Appellant: If there was any conspiracy in the first place, it ended on June 20, and this statement would not be in furtherance of the conspiracy, and secondly, . . . there is no conspiracy established in this case through the testimony of Mr. Collins.

The People: That would be, if that's the situation, Your Honor, there would never be a case of conspiracy, if anybody merely kept out of the picture and went through an intermediary—that is not my understanding of the law. When he appears afterwards and certainly the conspiracy is not then, because the money was not paid, but when he appears and adopts the actions of Willie Harris and explains what this man's understanding was when he appears and explains that it is all right the act you have done—" (RT 85-86).

At this point the jury was excused; argument upon the admissibility of the hearsay statements of co-conspirators continued in the absence of the jury. (RT 86).

In the ensuing argument, counsel for Henry George (1) objected to testimony of Henry George's out-of-court statements made after the murder, on the ground that the corpus delecti of conspiracy could

not be proven by the defendant's own subsequent out-of-court admissions of such prior agreement; and (2) objected to all co-conspirator statements on the ground they were hearsay.

The trial court ruled that:

> ". . . The murder had been done, but the conspiracy wasn't complete, because they hadn't been paid. . . . I rather agree with the prosecution that there is a prima facie case made at this time [which] would be sufficient to entitle the jury to consider the matter. Motion is therefore denied." (RT 87-94).[1]

Upon returning the jury was instructed by the trial court:

> "Now, there was a motion made by defense counsel, Mr. Branner, for Mr. George, that this testimony would not be binding on Mr. George. The jury should be admonished accordingly. The Courts feels that there is prima facie evidence of a conspiracy at this time, and therefore, the jury may consider all the evidence of the alleged coconspirators, Collins, Wigfall, Harris and George, against Mr. George." (RT 95).

Collins, resuming his direct examination, testified that, at Willie Harris' garage:

> "[Willie Harris] said yes, George had just left the money. . . . he [Willie Harris] said he had four hundred dollars. . . . [Willie Harris] said . . . that [Henry George] said that he would try to get you some money here by the end of next

[1]The entire objections, argument and ruling are set forth in Appendix A.

week . . . So when Willie Harris handed the money over, Melvin took the money." (RT 96-97, which money was then changed at a bank and split between Wigfall and Collins).

Collins testified at length concerning the arrest trap set for Wigfall and Collins by Jack Jones, undercover C.I.I. agent, which trap in turn was set up by Willie Harris while doing "special investigative work" for the Monterey sheriff's office.

Willie Harris gave Wigfall and Collins the telephone number of Jack Jones, who Willie Harris said had called Willie Harris and said they were friends of Henry George and that George was scared, (RT 108), to which, appellant objected:

"Appellant: Wait a minute. I want to enter an objection, your Honor, because . . . he is commencing to relate and what he has related so far is hearsay as to Henry George or statements made after any termination of any possible conspiracy.

. . . The People: Well, your Honor, I certainly take the position that the conspiracy has not terminated but . . . what this man said as to Willie Harris would not be binding on Henry George.

The Court: Objection sustained." (RT 108).

Collins testified that Collins and Wigfall telephoned the number given them by Willie Harris, at 5 p.m. time, and,

". . . someone . . .answered to the phone to the name of Jack Jones, and he said that he was a friend of—

Appellant: Wait a minute. Again I want the objection to continue, if I may, without having to get up all the time, your Honor.

The Court: All right.

The Appellant: And the jury admonished.

The Court: I take it at this time you hadn't been fully paid by Mr. George?

Collins: No.

The Court: Is that correct?

Collins: Yes.

The Court: These phone calls were made in pursuance of some effort to obtain that payment?

Collins: Yes.

The Court: Objection overruled." (RT 109-110).

Collins, (resuming his testimony subject to the continued hearsay objection of appellant), testified that Wigfall told him what Jones said. (RT 111).

"Appellant: . . . I don't think, your Honor, it is admissible against George because now he is beginning to relate what Mr. Wigfall told him was told Mr. Wigfall by a third party.

The Court: If the jury finds a conspiracy, it will be against all parties, and not for the truth of what this man said, but what was said and what these men did as a result of it if it was a conspiracy, it would bind George, and it is up to the jury to determine it and I merely feel it is a prima facie to go to the jury, (sic) and I will admit the testimony. Continue." (RT 112).

Collins then testified that:

". . . he [Jones] said George was afraid to come back to town but that he [George] had work for

> him [Wigfall] to do and that he [George] wanted to pay off . . . $500 . . ., so at this time Melvin related to me what was said, so I told him that $500 wasn't going to get him back into town, so . . . [Jones] said the next morning at 10 o'clock he could have maybe $1,000, so—" (RT 112).

At this point the trial court ruled upon its own motion:

> "The Court: Well, not for the truth of the statement the end of simply what Wigfall told him and that will be received in evidence what these men did and the reliance thereupon and the jury is admonished accordingly." (RT 113).

Collins and Wigfall did go to San Jose the next morning and there telephoned Jack Jones at 10:00 a.m., after which there was a series of telephone calls from telephone booths about a meeting place. Finally Collins himself telephoned Jones from the Greyhound bus station and told Jones they would not go to Jones' motel, to which Jack Jones replied:

> "Well, I'll just call up Hank and tell him that he can handle his own business." (RT 116).

In response, Collins told Jones to leave the money at the third telephone booth at the bus station; but Jones did not show up. (RT 117). Collins and Wigfall then drove to the San Jose Inn, where Jones was staying, and Wigfall went inside. Collins drove the car and parked in the street and waited. Wigfall reappeared a few minutes later with "another fellow" [Jack Jones] who opened his car trunk. After

that, Collins could not see what transpired, and at this time both Wigfall and Collins were arrested by Jack Jones and other officers. (RT 148-149).

That Willie Harris set up the arrest trap of Collins and Wigfall, (RT 1240-1242), and that a true transcript of the setup telephone call with Jones included the following conversation, (abbreviated of nonessentials):

> "Willie: Hello.
>
> Jones: Hello.
>
> Willie: Ah. This is Willie. I've been had. . . . They're all upset. They've been up there all night watching you. Now, listen, they're real good. They're a little cageay, so they give me a number for you to call them. It's 293- . . . 9682. See, I give it to him, so you could have had—so you could try to find out where they were. But whatever you do, try not to bust them today but gain their confidence, get them tomorrow or the next day.
>
> . . . Jones: Well, are they going to try any funny business?
>
> Willie: No, they're not going to try anything if you are going to pay them. If you are going to pay them, they are going to take it and come on back and wait for the next meet. . . . You call them right away now, . . . Don't let no slip-up, because my life ain't going to be worth ten cents now. . . .
>
> . . . Jones: Fine. Thanks, Willie." (RT 1245-1248).

Upon the conclusion of the testimony of Willie Harris, the People rested the case-in-chief. (RT 1265).

Erroneously admitted evidence:

It will be recalled that from the outset of the first witness Ivory Collins' testimony, that appellant maintained a running objection to the hearsay statements of the coconspirators; but that, eventually, the trial court ruled, and instructed the jury:

> "The Court feels that there is prima facie evidence of a conspiracy at this time, and therefore, the jury may consider all the evidence of the alleged coconspirators . . . against Mr. George." (RT 95).

The bulk of the following evidence was admitted as the direct consequence of, and pursuant to, the above ruling that all the hearsay statements of the coconspirators were admissible against appellant Henry George.[2]

* * * *

John Rennels, Carmel Savings and Loan vice-president, was asked on direct examination if, when Willie Harris came into the Carmel Savings and Loan on July 5, 1967 to make his mortgage payment,

> "Q: Did Mr. Harris make any reference to Mr. George making any payment for him?
>
> The Appellant: Objection, your Honor, going to hearsay and it has not been established that a conspiracy continued in this case.
>
> . . . The People: Well, your Honor, I think we have established the conspiracy continued because of the fruits and we went into that.

---

[2]The inadmissible hearsay testimony of Collins has previously been set forth and is, accordingly, not repeated in this portion of the Statement of Facts.

> . . . Appellant: I submit at this time, your Honor, still on the basis that there has been no establishment of a continuation of a conspiracy.
>
> The Court: I have stated what the position was, and I think it is a fair one that there is a prima facie evidence of the continuation of a conspiracy and therefore it would be being at this time and the witness may testify.
>
> The People: Do you remember the question, sir?
>
> A: You asked me if Willie Harris made any statement at that time [July 5, 1967] when he came in with his loan payment . . . as to Henry George owing him money. He [Willie Harris] did say that Henry George promised him money out of his [Henry George's] savings account, and that he [Henry George] was in—that he had gone to—taken off for Mexico and that he [Henry George] was in trouble." (RT 566-568).

Sheriff's Sergeant Thomas Shephard testified on direct examination that on the same day, July 5, 1967, he monitored the Fargo bugging unit which had been placed in the house of Willie Harris. (RT 635-637):

> "I overheard conversations between Mr. Wigfall and Mr. Collins pertaining to trying to locate Mr. George. And they suggested going over and contacting his mother and father. And Mr. Wigfall stated that Mr. George had mentioned that he hadn't spoke to his mother and father in four years, so they wouldn't know where he was at. And in general, the conversation was that they were trying to locate Mr. George." (RT 637.)

"They" also had a conversation about Mary Mouton. "I don't recall exactly what it was." (RT 637).

Sheriff's Lt. David Cook testified on direct examination that on July 5, 1967 he heard, via the Fargo unit previously placed in the house of Willie Harris:

> "At the time [Collins and Wigfall] entered the house, there were the usual greetings and Mr. Harris pointed out that he had a couple of bits of information that might be of some help. He mentioned that he had an address of 1728 Noche Buena of the girl and he also mentioned that he knew where Mr. George's father was in Pacific Grove; and at that time Mr. Wigfall mentioned what good was that, and Mr. Harris said, 'Well, we can call the father and find out where Mr. George's brother is in San Jose or Hayward' . . . There was some conversation about Mr. George not showing up at a meeting at the club, and Mr. Wigfall responded, 'Yeah, I know he was scared.'
>
> Appellant: Your Honor, I object to these statements on the ground of previous statements being made by other individuals.
>
> The Court: The only question we have is a prima facie case to go to the jury on conspiracy.
>
> The Witness: The other conversation Mr. Harris brought out, he asked, 'Did you get rid of that thing?' To which Mr. Collins said, 'The gun?' And Mr. Harris says, 'Yeah', and then Mr. Collins said, 'Yes', and the concluding part of it was Mr. Wigfall mentioned that he would keep this address on Noche Buena and check with the girl to see if she knew where George was." (RT 739-740).

On cross-examination by counsel for Wigfall, Lt. Cook testified that he did insfruct Willie Harris, during the morning of July 5, 1967, "to cover some of

the facts so they could be recorded on the Fargo equipment". (RT 749). During this July 5th meeting of Willie Harris, Wigfall and Collins, Collins also said:

> "That son-of-a-bitch better get back here and get me some money." (RT 752).

Wigfall also said that Henry George was ducking them, and that Wigfall had not seen Henry George for some time. (RT 752).

In respect to the testimony of Jack Jones, the undercover C.I.I. agent, the trial court ruled that his hearsay testimony was admissible against appellant:

> "The People: Call Mr. Jones.
>
> The Court: I'm satisfied with my prior ruling in the matter of conspiracy. I've read your briefs and I'm satisfied of my prior ruling." (RT 769, lines 15-18).

Following the above blanket ruling, Jack Jones testified on direct examination that as the result of an "arrangement" made by the sheriff's office, he received a telephone call from Wigfall at 5:15 p.m. on July 26, 1967. (RT 770-771).

> "I identified myself as an intermediary for Hank George and asked the party at the other end of the line what he would settle for, as I understood Mr. George owed him some money. I stated I had $500 with me. And [Wigfall] indicated he wanted a thousand, so I agreed . . . I told him, however, that I would have to get back with Hank George the following morning to get the other $500. First we agreed for the party to come

to a motel room to pick up the $500. Then it was decided that he would wait until the full thousand was together and he would meet me." (RT 771).

Arrangements were made with Wigfall for a telephone call the following morning (July 27). (RT 771).

"I informed [Wigfall] that I would be at the San Jose Inn motel . . . in San Jose . . . Room 41." (RT 771-772).

The following day, July 27, Jack Jones had more conversations with Wigfall. (RT 772). These conversations were recorded and existing. (RT 772). The first July 27th conversation with Wigfall on July 27th was at 10:20 a.m., to a San Jose number Jack Jones had received from [Willie Harris]:

"I asked for a party by the name of J. B. He directed that I come to a Spanish restaurant . . . and leave the money in a phone booth. I objected to this. . . . I ended up by indicating to him that I would deliver the money to the location at approximately 11:30 a.m. . . . I went back to the motel and while there at approximately 10:45 a.m. I received another phone call at the motel . . . [from] Ivory Collins . . . I was directed by [Collins] to come to the bus station and leave the money in a phone booth at the local bus station. . . . At 11:55 a.m. I received another phone call . . . from Mr. Wigfall . . . [The very start of the conversation, I state(d), 'Look, I talked to Hank because I told you last night that you want the money' . . . (and) . . . 'Look, Hank told me to find out if you are the right guys' . . . I

told [Wigfall] that . . . if they wanted the money they would have to come to the motel . . . Another part . . ., Mr. Wigfall stated, 'You say you're trying to help Hank, that's what you say. Well, sure don't seem like it.' . . . [Wigfall] asked me to have the phone number of Mr. George. . . . I told Mr. Wigfall that Hank wanted to make sure that it got to the right people. . . . I told [Wigfall] that he had to get to the motel before 12:30 because I was checking out and he could take it up with Hank later.'" (RT 773-776).

At approximately 12:30 noon, Wigfall came to Room 41 at the San Jose Inn motel. (RT 776). The following conversation between Jones, his C. I. I. supervisor McVarish, and Wigfall, occurred:

"Wigfall: Anyone else here?

McVarish: There's no one else here.

Jones: How do I know you're the right guy that I got?

Wigfall: He knows I'm the right.

McVarish: Tell him the thing Hank asked you to ask him.

Jones: He said to just on those fingerprints, he's worried to hell about it. Did you touch anything at the house that night?

Wigfall: No. Don't have to worry about nothing.

Jones: He's scared of you.

Wigfall: Not me he's afraid of, it's the other people he's afraid of. I went to bat for him. I've got money tied up, too. There's four people involved.

Jones: Four?

McVarish: That ain't what he told us.

Wigfall: I mean from my side. He don't even know who these other people are.

Jones: How about any chances the gun coming back? You got rid of it?

Wigfall: Oh, yes.

McVarish: We didn't want no mistakes on this, you know.

Wigfall: Everything that went wrong was his fault including this.

McVarish: What went wrong that was his fault to begin with?

Wigfall: In the first place, not supposed to be no more chance of nothing (unintelligible) and he didn't even show up for a week after it happened.

Jones: Now, listen, if I give you this dough, this is the end of it.

Wigfall: That's the end of it. . . . I won't bother him at all.

McVarish: How about this broad of his that he mentioned?

Wigfall: No.

McVarish: Did you go see his broad?

Wigfall: Other people went to see her, I didn't.

McVarish: There's one other thing he said to tell you, that the contract is off on Margaret, his wife. Did he tell you?

Wigfall: He talked to me, he talked to me.

McVarish: No, he want to be sure.

Wigfall: He told me— (something).

McVarish: That she don't get hit.

Wigfall: Hey, we've already talked about this, you know.

Jones: All right, you understand this, now, the deal on his wife is kapoot, too.

McVarish: Well, get him the dough out of the car." (RT 778-781).[3]

Jack Jones then got $1,000.00 in an envelope from his car trunk, and handed it to Wigfall, who said: "Is the full thousand there?", to which Jones assured him it was. (RT 781). Wigfall was then arrested. (RT 781). Collins was then arrested while seated in his yellow Cadillac on an adjacent street. (RT 781). When Wigfall placed his hand on the wall during the arrest search, the marked-money envelope fell from his left hand. (RT 781).

In concluding direct examination, Jack Jones testified that he had no authority from Henry George, and had never met appellant. (RT 781).

Cross-examination by counsel for Wigfall (RT 782-790), and by counsel for Henry George (RT 790-794), did not substantially alter the direct testimony of Jack Jones, except that Jack Jones did therein testify that he got the telephone number for his July 27 call from a Willie Harris telephone call. (RT 786).

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[3]This testimony has been shortened by deletion of repetitive and immaterial portions.

On redirect examination, Jack Jones testified that he gave a Miranda warning to Wigfall in the motel room upon his arrest. (RT 795-796). At this juncture, the appellant moved the trial court to admonish the jury that the forthcoming Wigfall statement was applicable to Wigfall (only). (RT 796).

During the ensuing argument in the presence of the jury, deputy district attorney Barnes twice stated that

> ". . . it is intended to show he knew Mr. George" (RT 796, lines 16-17),

and

> "I am offering it for the purpose to know that he was familiar with Mr. George and knew Mr. George." (RT 796, lines 24-26).

The trial court then stated, still before the jury, that the proposed Wigfall statement violated the *Aranda* rule, the conspiracy rule, and the hearsay rule. (RT 797). The trial court then told the jury:

> "The jury is admonished to disregard that entirely; the statement made by counsel for the prosecution about any statement that may or may not have been made by Mr. Wigfall at that time to this officer, particularly insofar as it pertains to Mr. George. You will disregard that, and it is stricken from the record." (RT 797).

The jury was then recessed, and without the jury present, appellant's counsel condemned the prosecution for asking the question in view of the *Aranda* decision (RT 798); then appellant's counsel stated:

> "I moved for a separate trial before the case began, Your Honor.

The Court: There was no reason for it. I am sorry that happened . . .

Appellant: . . . it came from Mr. Barnes who was making an offer of proof.

The Court: I know, but I regret that, but I don't think it justifies a mistrial. Motion is denied if it is a motion for mistrial." (RT 799-800, ruling on RT 800, lines 7-9).

* * * *

Mrs. Margaret George testified that she wrote a letter and delivered it to Darlene Sanchez:

"I wrote it to whom it may concern, and I told her to turn it over to the police in the event anything should happen.

Appellant: I object, your Honor. At this time I object to the materiality of this. This is going to her state of mind.

The Court: That is exactly right. The jury is admonished accordingly, received only for that limited purpose.

The Appellant: This is not going to the state of mind of Mr. George.

The Court: Proceed, counsel." (RT 461-462).

Mrs. George accordingly testified that in the letter:

"I said that if anything happened to me that was not obviously an accident, that my husband should be suspected of it." (RT 462).

At this point, appellant promptly moved for a mistrial.

"At this time I would make a motion for mistrial in this case based on the fact that Mrs.

> George was permitted to testify over my objection as to her own mental state in writing a letter some months before the killing . . . under the test as laid down in the *Hamilton* case, 55 Cal.(2d) 881 . . . I do not believe we have such a situation where it is admissible in this case . . . And for a jury to separate mental state from the truth of the charges is a psychological impossibility. Hence the trial judge must determine whether the probative value of the evidence is substantially outweighed by the probability that its admission will be unduly prejudicial . . . I do not see how the contents of that letter . . . could at all be material to this case and how anything involved in what she has recited could possibly outweigh the prejudicial effect to the jury . . . the statement of the past mental state is inadmissible hearsay. And on that basis I think what Mrs. George has recited is inadmissible and extremely prejudicial . . . and on those grounds I would move for a mistrial at this time.
>
> The Court: I am satisfied that this comes "within the rule of *People v. Mercouris,* 52 Cal. (2d) 672, 682 . . . the declarations that the defendant threatened the victim were admissible not to prove that fact directly but to prove the victim's fear as identification of the defendant as a killer is an issue and this, certainly, . . . is in issue, and the motion is denied." (Mistrial motion, RT 462-466; trial court ruling, RT 466-467).

On cross-examination, Mrs. George testified that the letter was written in February 1967 "after a bad argument" in which Henry George "possibly could

have threatened her, after he 'broke the door down in the bedroom and came in there.'" (RT 438).

* * * * *

Co-defendant Melvin Wigfall testified in his own behalf on direct examination that he was a gambler by occupation (RT 1824), at his house in Seaside across the street from Willie Harris' house (RT 1825, 1828); that Willie Harris asked Wigfall to collect $1,000 owed Harris on a deal concerning the burning of his house (RT 1829); that Willie Harris told Wigfall that:

> ". . . he and Mr. George had set fire to the house, and he and Mr. George was supposed to receive the insurance money. He said Mr. George had failed to [pay Harris]." (RT 1832).

He further testified that Willie Harris said in June 1967, after Wigfall collected the $1,000 from Henry George, that Willie Harris would send Wigfall to buy $4,000 counterfeit money, with Harris and Wigfall to split the proceeds 50-50. (RT 1833, 1829).

On June 18, 19 and 20, 1967, during all the periods involved, Wigfall was shooting dice with a Sgt. DeLoche. (RT 1835, 1837-1841). Wigfall never saw Henry George until they were in the county jail. (RT 1843). Wigfall did go to an apartment building, Apartment E, in Fireside, looking for George, in response to Willie Harris' instructions, to collect money Harris said Henry George owed. (RT 1844, 1846). The next day, a gentleman in Apt. E told Wigfall that Henry George had moved to the basement apartment. (RT 1845). In July Harris told

Wigfall there was someone who wanted to pay for Henry George, and gave Wigfall the phone number and told Wigfall to "go up and pick up this money". (RT 1847). Harris told Wigfall to tell "whoever was acting for George",

> ". . . that it would be all right for him to come to town and nothing would happen to her or his wife, as long as he paid off the money. . . . I asked him what was it all about. He told me it was concerning the burning of his house and people that he had paid to burn his house. . . . He told me to agree with [the people in San Jose] . . ." (RT 1848-1849, also 1849-1855).

On cross-examination, Wigfall substantially repeated his direct testimony (RT 1856), during which he also was extensively questioned about the hearsay statements made at the San Jose arrest trap, which hearsay statements were once again repeated thereby to the jury (RT 1886-1904); Wigfall testified these hearsay statements were all made consistent with the instructions of Willie Harris to collect $1,000 for the house-burning and to agree with whatever the pay-off men in San Jose told Wigfall. (RT 1877-1904, 1906-1908).

Wigfall admitted a 1956 Texas conviction for marijuana possession and a 1960 Texas conviction for burglary. (RT 1915-1916).

Willie Campbell testified on direct examination, corroborating the gambling alibi of Wigfall. (RT 1916-1924).

The Wigfall defense then rested its case in chief. (RT 1924).